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State v. Call Appellant's Brief Dckt. 43014

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43014
Plaintiff-Respondent,)	
)	BANNOCK COUNTY NO. CR 2009-1352
v.)	
)	
KEVIN W. CALL,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Kevin Call appeals from the district court's Minute Entry & Order Reinstating Sentence, in which the district court revoked his probation and executed his unified sentence of 15 years, with 5 years fixed, originally entered upon Mr. Call's guilty plea to aggravated battery and the use of a deadly weapon during the commission of that crime. Mr. Call asserts that the district court abused its discretion when it failed to reduce the fixed portion of his sentence by one year in light of the mitigating factors that exist in his case.

Statement of the Facts & Course of Proceedings

The State charged Kevin Call with aggravated battery and with the use of a deadly weapon while committing that crime. (R., pp.63-66.) Mr. Call pled guilty as charged and, in exchange, the State agreed to recommend the court impose a term of probation. (R., pp.108-112.) The district court imposed a unified term of 15 years, with 5 years fixed, and suspended the sentence placing Mr. Call on probation for a period of 15 years. (R., pp.113-115, 123-125.) Approximately four months later, the State alleged that Mr. Call violated the terms of his probation by committing misdemeanor battery and by consuming alcohol; Mr. Call admitted he committed the alleged violations, and the district court continued his probation. (R., pp.134-135, 141-142.)

The State again alleged that Mr. Call violated the terms of his probation by committing a domestic battery and by again consuming alcohol; Mr. Call admitted that he committed the crime of disorderly conduct and to being intoxicated when he was arrested for that charge, and the district court retained jurisdiction. (R., pp.146-147, 183-191.) Mr. Call successfully completed his rider and the district court again placed him on probation. (R., pp.192-196.) Three years later, the State again alleged that Mr. Call violated the terms of his probation; Mr. Call admitted he had done so by being arrested for possession of stolen property and convicted of driving without privileges, by handling a hunting rifle, and by failing to pay various costs and fees; and the district court again continued Mr. Call on probation. (R., pp.200-203, 215-216.)

Once again, the State alleged that Mr. Call violated the terms of his probation by being charged with attempted strangulation and battery, by failing to pay various financial obligations, and by being discharged as non-compliant from an aftercare

program he was required to complete. (R., pp.228-238.) Mr. Call admitted that he violated the terms of his probation as alleged and asked the district court to execute a reduced sentence of 15 years, with 4 years fixed, to run concurrently with the sentence imposed in a separate attempted strangulation case. (R., p.245; Tr., p.10, L.15 – p.14, L.13.) The district court revoked Mr. Call's probation and executed the previously imposed unified sentence of 15 years, with 5 years fixed. (R., pp.246-253; Tr., p.17, Ls.1-17.) Mr. Call filed a timely Notice of Appeal. (R., pp.254-257.)

ISSUE

Did the district court abuse its discretion when it declined to reduce the fixed portion of Mr. Call's sentence upon revoking his probation, in light of the mitigating factors present in this case?

ARGUMENT

The District Court Abused Its Discretion When It Declined To Reduce The Fixed Portion Of Mr. Call's Sentence Upon Revoking His Probation, In Light Of The Mitigating Factors Present In This Case

Mr. Call asserts that the district court abused its sentencing discretion. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. Where a probationer has admitted to violating the terms of probation, the decision on the proper disposition is left to the sound discretion of the district court. The governing objectives in determining the appropriate punishment for criminal behavior are: (1) protection of society; (2) deterrence of the

individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Mr. Call appears to have some significant mental health problems which are exacerbated when he is not on his medications. (PSI, p.8.)¹ He was diagnosed with anxiety and depression at the age of sixteen and has contemplated suicide. (PSI, p.12.) There are indications that Mr. Call was diagnosed with bi-polar disorder and prescribed Depakote, but he ran out of his medication and was not taking it when he committed the offense which ultimately resulted in his probation being revoked. (R., p.235.) Mr. Call expressed his regret both for having committed his underlying offense and for continuing to violate the terms of his probation, and he requested that the court reduce the fixed portion of his sentence in order for him to be able to get into a prison treatment program as soon as possible. (PSI, pp.3-4; Tr., p.13, L.22 – p.15, L.5.) Idaho Courts recognize that mental health issues and remorse are mitigating factors that should weigh in favor of imposing a less severe sentence. See *Hollon v. State*, 132 Idaho 573 (1999); *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991). Mr. Call asserts that the district court abused its discretion by failing to reduce the fixed portion of his sentence in light of the mitigating factors that exist in his case.

¹ Citations to the Presentence Investigation Report and attached materials will include the page number associated with the electronic file containing those documents.

CONCLUSION

Mr. Call respectfully requests that this Court reduce his sentence to a unified term of 15 years, with 4 years fixed, or for whatever other relief this Court deems appropriate.

DATED this 30th day of September, 2015.

_____/s/_____
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of September, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

KEVIN W CALL
INMATE #92730
CARIBOU COUNTY JAIL
475 EAST 2ND SOUTH
SODA SPRINGS ID 83276

ROBERT C NAFTZ
DISTRICT COURT JUDGE
E-MAILED BRIEF

RANDALL D SCHULTHIES
BANNOCK COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCP/eas